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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1932

ALBERTO COSTANZO, PETITIONER

v.

ANNA C. M. TILLINGHAST, UNITED STATES COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The District Court rendered no opinion. The majority and concurring opinions in the Circuit Court of Appeals (R. 37, 41) are reported in 56 F. (2d) 566.

JURISDICTION

The judgment sought to be reviewed was entered February 25, 1932. (R. 42.) The petition for certiorari was filed May 25, 1932. Although he does not so state, petitioner presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

If they may properly be considered, the petition for certiorari presents the following questions:

1. Whether, under Section 19 of the Immigration Act of 1917, an alien found managing a house of prostitution must be taken into custody and deported within five years after entry or whether such arrest and deportation may be effected at any time after entry.

2. Whether there was sufficient evidence to support the administrative finding that petitioner was managing a house of prostitution.

STATUTE INVOLVED

Section 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889–890 (U. S. C., Title 8, Sec. 155), reads in part as follows:

> That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or

where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * *Provided further,* That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: * * *.

STATEMENT

Petitioner, a citizen of Italy, who entered this country about 1905, was arrested on an immigration warrant dated March 16, 1926, which charged him with being in the country unlawfully in that, after entry, he was found managing a house of prostitution. (R. 4, 11, 13, 24.) It appears from petitioner's testimony at the various hearings before the immigration authorities that he was born in Italy and came to this country at the age of five. He has never taken any steps to become a citizen. (R. 9, 12, 13, 14, 18.) In 1916 or 1917 he was convicted of stealing a machine, for which he served six months in jail. (R. 14.) In December, 1927, he was convicted in a State court in Rhode Island, following a plea of "nolo," of the charge of "harboring for prostitution," and was sentenced to three years in prison, of which sentence he served sixteen months and fourteen days, when he was

paroled. (R. 7–8, 14–15.) As the result of information supplied by the judge who sentenced him, an investigation, out of which the present charge grew, was begun by the immigration authorities. (R. 8.) Although petitioner denied that he was running a house of prostitution, he admitted that the premises were leased in his name, and that, while he paid but $30.00 a month rent, he subleased the premises for $60 a month to one Ritchie, who, he claimed, ran the place, and was sentenced, on account thereof, to two years in prison. (R. 15, 19, 21–22.) He also admitted that on one occasion he took a girl to this place in his car, knowing her to be a prostitute. (R. 15–16, 19–20.) She apparently remained there as one of the two inmates, for three days later, when the place was raided by the State police, she was still there. (R. 16, 20.) Petitioner was also present at the time the house was raided. (R. 16.) At least twice a week petitioner was at the place to collect the "rent" and to bring "supplies." (R. 19, 21–22.) While he was serving his sentence for the State offense, petitioner's wife divorced him and was awarded the custody of their two children. (R. 17, 18.)

As a result of this testimony the immigration authorities found that petitioner was managing a house of prostitution, and on August 26, 1927, issued a warrant for his deportation. (R. 24–26.) Petitioner thereupon filed in the United States District Court for Massachusetts a petition for writ of habeas corpus, which appears to have been based

principally upon the ground that the effect of deporting him would be to impose additional punishment for the crime against the State of Rhode Island which he had already expiated, and that deportation would consequently constitute cruel and unusual punishment, in violation of the Eighth Amendment. (R. 1–4.) A summons was then issued to respondent to show cause why the writ should not be granted. (R. 5.) After a hearing the court dismissed the petition. (R. 5–6.) On appeal its judgment was affirmed. (R. 42.)

ARGUMENT

Before discussing the questions which petitioner seeks to present, it should be noted that the petition and supporting brief do not comply with the rules of this Court. They contain no assignment of errors and no reference to the statutory provision supporting this Court's jurisdiction. (Rules 12, 27, 38, par. 2.)

Furthermore, so far as the record discloses, neither of the two questions which petitioner now urges were raised in the District Court or covered in his assignment of errors filed in connection with his appeal to the Circuit Court of Appeals. (R. 33.) The only questions discussed by that court were whether a five-year period of limitation applied to petitioner's deportation, and also whether deportation would constitute cruel and unusual punishment. The latter question is not discussed in the petition and supporting brief, and evidently has

been abandoned as clearly without merit. (See *Bugajewitz* v. *Adams*, 228 U. S. 585, 591.)

I

The charge made against petitioner in the warrant of arrest (R. 11) and in the warrant for deportation (R. 26) was that he was found, after entry, managing a house of prostitution. It was not, as he assumes in his statement of the questions presented (Pet. p. 2), "harboring for prostitution," the offense of which he was convicted in the State court.[1] Deportation was not based upon that conviction. Of course, as a prerequisite to deportation, an alien need not be convicted of any offense if he is in fact found to be managing a house of prostitution.

This Court has recently declined to review a decision holding, as did the court below in the instant case, that Section 19 of the Immigration Act of 1917 (*supra*, p. 2) does not prescribe a five-year period of limitation upon the deportation of

[1] The record does not disclose the particular section of the State statutes which petitioner was convicted of violating. Section 6, Chap. 399, General Laws of Rhode Island, 1923, makes it an offense punishable by imprisonment for not more than five years " for any person to secure a female for a house of ill-fame, or to procure for a female a place as inmate of a house of ill-fame, or by any promise * * * to cause, induce, persuade or encourage a female to * * * become an inmate of a house of ill-fame, or enter a place in which prostitution is encouraged or allowed, or remain therein as such inmate * * *."

aliens falling within the class to which petitioner was found to belong. *Ranieri* v. *Smith,* 49 F. (2d) 537 (C. C. A. 7th); No. 361, October Term, 1931, certiorari denied October 26, 1931, 284 U. S. 657. In that case the Government pointed out in its brief in opposition that while time limitations affecting deportability are expressly prescribed in Section 19 as to certain classes of aliens, there is none affecting those engaged in activities connected with prostitution, and that the third proviso of the section, which reads—

> That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: * * *,

prevents the application of time limitations to aliens of the class here involved. The Government's brief also referred to the decision of the Circuit Court of Appeals for the Ninth Circuit in *McLeod* v. *Nagle,* 48 F. (2d) 189, which dealt with a parallel class of aliens and in which the court held that the construction for which petitioner contends would be contrary to commonly accepted grammatical rules, saying (p. 190):

> * * * the beginning phrase, "at any time within five years," can not be carried over to each of the succeeding clauses; each of the latter must be modified only by the time limit specifically stated therein, and, if no time limit is expressed, then the section must

be interpreted to mean "at any time after the entry of the alien into the United States."

In addition to the *McLeod case*, the Government cited the following cases as supporting the decision in the *Ranieri case*: *Pilliss* v. *Smith*, 46 F. (2d) 769, 771 (C. C. A. 7th); *In re DiFilippo* (*Cafara* v. *Tillinghast*), 31 F. (2d) 384 (Mass.), aff'd. 31 F. (2d) 1009 (C. C. A. 1st); *Lauria* v. *United States*, 271 Fed. 261 (C. C. A. 2d), certiorari denied, 257 U. S. 635; *Ex parte Gin Kato*, 270 Fed. 343 (W. D. Wash.).

Since the denial of the petition for certiorari in the *Ranieri case* two cases have been decided by the Circuit Court of Appeals for the First Circuit sustaining the Government's position, the instant case and *Tillinghast* v. *Cresswell ex rel. Di Pierro*, 54 F. (2d) 459,[1] which reversed a decision rendered by the concurring judge in the instant case while sitting in a District Court (45 F. (2d) 658). In each of these cases the authorities are reviewed at length and several additional decisions supporting the Government's view are cited which were not referred to in the Government's brief in the *Ranieri case*. In both opinions the Circuit Court of Appeals stated that the only case reaching a contrary conclusion which it found is *Hughes* v. *Tropello*,

[1] In this case a petition for certiorari was denied by this Court on May 31, 1932 (No. 980, October Term, 1931), because the petition was not filed within the time provided by law.

296 Fed. 306 (C. C. A. 3d). It is true that in that case the Circuit Court of Appeals for the Third Circuit stated, with reference to Section 19, that "the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein," but it should be pointed out that the Government in that court conceded in its brief (pp. 9–10) that the applicable period of limitations was five years, and addressed its argument to the question whether, under Section 19, deportation proceedings must not only be instituted but concluded within the five-year period. The analysis of the *Tropello* decision contained in the opinion in the *Di Pierro case* leaves no doubt as to its unsoundness upon the point involved in the instant case. It was decided in 1924, and was apparently ignored by the various Circuit Courts of Appeals which have since passed upon the question until the decision of the *Di Pierro case* in 1931. Its influence has been negligible, and even if it may be considered as in conflict with the instant decision, we do not think that the conflict requires the exercise by this Court of its supervisory power at the present time.[3] Certiorari may, we submit, well await another decision by the Circuit Court of Appeals for the Third Circuit rendered in the absence of a con-

[3] The petitioner in the *Ranieri case*, *supra*, did not rely upon the *Tropello case* as presenting a conflict of decisions upon the question of the proper construction of Section 19 of the Immigration Act of 1917. The *Tropello case* was not discussed in the Government's brief in opposition.

cession by the Government and in the light of the numerous cases sustaining the Government's position which have been decided since the *Tropello case.*

II

As stated above (*supra,* p. 5), the contention that there was insufficient evidence to warrant the immigration authorities in finding that petitioner was managing a house of prostitution was not raised in his assignment of errors in the court below nor passed upon by that court.

The evidence has been summarized at pp. 3–4, *supra.* Even if the question were now open, we think the evidence was clearly sufficient to support the order of deportation, particularly in view of the rule expressed by this Court in *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106—

> Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince the court of the essential unfairness of the trial. *Tisi* v. *Tod, supra* [264 U. S. 131, 133].

CONCLUSION

The case was correctly decided below, and we do not think it presents any question requiring the consideration of this Court at the present time. The petition should be denied.

Respectfully submitted.

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